APPEAL NO. 002366

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 15, 2000. The issues at the CCH were whether the respondent (claimant) sustained a compensable repetitive trauma injury and whether she had disability as a result of such injury.

The hearing officer determined that the claimant sustained a repetitive trauma injury to her back on _____, and that she had disability beginning on April 27, 2000.

The appellant (carrier) has appealed. The carrier argues procedural error in the hearing officer's denial of its request for a continuance, and in the granting of the claimant's request for a continuance. The carrier argues that the hearing officer erred in admitting evidence which had not been timely exchanged and in finding good cause for the late exchange. The carrier finally argues that the determinations of a repetitive trauma injury and disability are against the great weight and preponderance of the evidence. The claimant responds that the decision of the hearing officer should not be set aside and is supported by the evidence. Both sides argue facts that are outside the record of the case, most especially in the procedural points of error that were raised.

DECISION

Reversed and rendered.

The claimant worked as an instructor at (employer) for two years. She said that on April 25, 2000, she could not get up for work due to back pain. The claimant said she had no idea this could be work-related. She was not able to see her family practitioner, so went to Dr. G, a chiropractor who was located nearby, for treatment the next day. Both she and Dr. G testified that Dr. G informed her that she had a repetitive trauma injury and it was work-related.

Dr. G testified that he determined the claimant had a repetitive trauma injury the first day he examined the claimant based upon a history that she gave of working in awkward positions. (His initial history from his first treatment of the claimant is not in evidence.) He said that the significant position was "bending" with her neck flexed upward. Dr. G did not testify regarding his understanding of the frequency and duration of such positioning. The evidence indicated that the computer terminals were at desk-top height.

Dr. G's only history was recorded on May 10, 2000. It described a full range of activities that the claimant did that also included standing "for long periods of time," squatting and stooping, and "overexertion." His diagnosis was cervical, thoracic, and lumbar strain, with disc syndrome, facet outlet, and intervertebral disc syndromes diagnosed also at these various levels. When asked about the claimant's walking activities, Dr. G discounted these as a concern in his diagnosis, stressing that it was the

claimant's bending and looking up at the same time that caused a cumulative trauma to her spine. He had not tested the claimant for arthritis and discounted her age (50) as a factor. Other objective medical tests were not preauthorized by the carrier. Dr. G stated that the extent of bending that would cause harm would vary from individual to individual.

The bending activity occurred, according to the claimant, when she taught computer classes but not her other classes. She said that she would walk around the room while the students were working on individual computers during which requests for assistance were constant. She testified that one of three things would occur: she would stand and give verbal assistance, which she stated was the best form of assistance; she would bend forward and do some keyboard or mouse work herself; or, for problems taking a longer time to resolve, would kneel or squat down next to the student and render assistance from that position. When directly asked twice by her attorney how much time on average in a two-hour[1] class period would be spent in a bending-over position, the claimant did not directly answer, but only stressed that the need to assist students took up most of the two-hour class time.

The claimant's transcribed interview with the adjuster noted that before April 25, she would sometimes feel tender at the end of her day, but that this was consistent with aches and pains one ordinarily feels. The claimant testified that nothing she could recall occurred on the day before she awoke with a sore back. The claimant said that she was five feet one inch tall.

There are 25 essentially identical statements which were signed by students or persons present in the computer lab at undisclosed times. These were admitted over objection as to untimely exchange. While the statements indicate that the claimant would bend over and turn her head to view a computer monitor, they state that the claimant would render assistance by "stooping, squatting, or kneeling, while using mouse or keyboard to assist student."

According to the claimant and the testimony of her supervisor, classes were given in three-week blocks. The claimant taught three two-hour classes per day, four days a week. She said each class also had a ten-minute break. For one three-week period and a week of a second term before she awoke with a sore back on April 25, she taught two computer classes, separated by a forty-minute lunch break. Prior to this, her only other computer class in the year 2000 was for the term (a single two-hour class) from January 6 through 26. While the claimant assisted in keyboarding classes between January 26 and March 30, she stressed that keyboarding assistance was not like that in her computer classes, and she was primarily there to aid other instructors. She contended that according to her schedule, she also taught computer classes in 1999, but her supervisor indicated that this would have been (in his recollection) on an assisting basis then.

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[1]The claimant referred to "130 minute" classes, but the actual start and end times she testified about were 120 minutes, or two hours.

Dr. G, who had done some functional capacity testing on the claimant, agreed that she could go back to teaching so long as she did no bending. The claimant testified that her business and office procedures classes consisted only of lecturing and did not involve bending. She said that Dr. G, however, had put her on "total disability" and had not released her, and she had not worked since _____.

The benefit review conference (BRC) in this case had been held on July 3, 2000. At the beginning of the CCH, the claimant tendered four exhibits that were objected to as not timely exchanged. The objection to a videotape was sustained. The other three exhibits consisted of a transcribed but unsigned statement (taken by the claimant's attorney) from another computer instructor, a signed statement regarding the claimant's activities in a community organization, and the 25 essentially identical statements signed by students or other persons present in the computer lab. Most of these statements had been signed in late July or early August. The attorney for the claimant agreed that none were exchanged by July 18, 2000, which was 15 days after the BRC, but were all apparently exchanged August 7, 2000. The claimant said she had not begun to obtain the student statements until after the BRC. The hearing officer, noting his opinion that the carrier was not "surprised" by these documents, found that all documents were clearly "additional discovery" and had been exchanged when available. He further noted that, as to the student statements of the claimant's activities, that since evidence of repetitious activities was a "necessary factor for proof" and because he would need such information "in developing the record," that this constituted good cause for admitting these statements. He found good cause in admission of the other instructor's interview because "she was a co-employee."

First, we note that no error was preserved on either granting of the claimant's continuance or denial of the carrier's similar request; neither order was mentioned at the CCH nor was another continuance motion made by the carrier. We cannot agree with the carrier's contention that there was an abuse of discretion by the hearing officer.

However, we agree that the hearing officer erred in admitting the coworker's interview and the students' statements, because the reasons the hearing officer cited do not constitute good cause for late exchange of the documents in question. Witness statements are expressly required to be exchanged under Section 410.160(3). Good cause must be found for late exchange of either the information or documents introduced late. Section 410.161. We have frequently stated that surprise, or lack thereof, to the other party is not a consideration in assessing good cause. Presupposing that the reference to "additional discovery" as a grounds for admission means evidence solicited to rebut matters raised for the first time at the BRC, this was true only of the statement detailing the claimant's activities in a community organization. Finally, while the actual documents may not have been created within the fifteen-day time limit for exchange, the information contained therein and the identity of persons who knew such information would have been known to the claimant at the time of the BRC. As such, a statement obtained from a coworker or the students in the class, all of whom describe matters relating to the claimant's posture that goes to the heart of her claim, cannot be said to fall under the ambit

of "additional" rebuttal discovery. We are also troubled by the hearing officer's recited basis for admitting the students' statements. The obligation of the hearing officer to ensure full development of the fact under Section 410.163(b) cannot provide a basis for circumvention of the exchange requirements.

All this being said, we cannot agree that admission of these documents constituted harmful error, because they are essentially cumulative of the claimant's testimony. And, just as in the claimant's testimony, evidence concerning frequency and duration of any alleged "traumatic bending" posture is lacking. If anything, the students' statements indicate that the claimant more frequently got down "beside" the student by stooping, squatting, or kneeling. Dr. G did not identify these as injurious activities.

Based on this record, a finding that the claimant sustained a repetitive trauma injury is against the great weight and preponderance of the evidence. Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Ordinary diseases of life are specifically excluded under Section 401.011(34). To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). Because activities at any given workplace cannot be left to common knowledge, it is essential for the injured worker to at least describe the actions, with some indication of frequency and duration, that are asserted to be "repetitive trauma," especially when the injurious activity is one that would be undertaken by persons in the general population.

It is striking in this case that there is essentially no evidence regarding the frequency and duration of the purported "bending" that caused the injury that would elevate this activity over and above an occasional activity during class. While there was testimony that "most" of her class time involved assisting students, this assistance took at least two other forms of posturing by the claimant: standing and rendering verbal instruction, which she said was the most desirable, and kneeling down next to the student for more complicated problems that would take a greater period of time. None of Dr. G's testimony or medical records described the purported "repetitive" nature of bending. His only written history of the claimant's work activities included numerous postures not identified as injurious. Consequently, there is a dearth of evidence in this record that would support the hearing officer's finding that the claimant in her work "underwent sufficient repetititve trauma to her spine to cause an injury." Dr. G's conclusion that there was a work-related injury, with no clear explanation of the facts upon which such conclusion is based, is insufficient to support the decision that a work-related occupational injury occurred.

It is also worth observing that the hearing officer's decision is based upon information outside this record. In his discussion, apparently as part of his understanding

of the mechanism of injury, the hearing officer stated: "[u]sually low back injuries do not occur when a person bends over, but when he or she tries to come back up to an erect position, whether lifting something or not" and "[t]he claimant's situation would cause a gradual onset of symptoms as the paraspinal muscles got weaker and weaker each day from the bending." Neither observation has evidentiary support in the record; in fact, the observation that bending does not cause injury is directly contrary to Dr. G's testimony attributing the claimant's injury to the act of bending and maintaining such posture.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Because we believe that to be the case here, we reverse the decision of the hearing officer and render a decision that the claimant failed to prove that a repetitive trauma injury arose out of the course and scope of employment, and render a new decision that the claimant suffers from an ordinary disease of life.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Thomas A. Knapp
Appeals Judge